No. 92-1911

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PUD NO. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR PETITIONERS

ALBERT R. MALANCA
KENNETH G. KIEFFER
GORDON, THOMAS,
HONEYWELL, MALANCA,
PETERSON & DAHEIM
2200 First Interstate Plaza
1201 Pacific Avenue
Tacoma, WA 98402
(206) 572-5050

WILLIAM J. BARKER
MARK L. BUBENIK
3628 South 35th Street
P.O. Box 11007
Tacoma, WA 98411
(206) 593-8218

HOWARD E. SHAPIRO
Counsel of Record
MICHAEL A. SWIGER
GARY D. BACHMAN
VAN NESS, FELDMAN & CURTIS
A Professional Corporation
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800
Attorneys for Petitioners PUD No. 1 of Jefferson County and the City of Tacoma

August 27, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The Brief in Opposition filed by the Attorney General of the State of Washington for respondents ("Washington") confirms the urgent need for this Court's review of the judgment of the Supreme Court of the State of Washington.

Washington claims that the judgment rests on independent state grounds that raise no issue of federal law (Opp. 10). In fact, however, the judgment of the Washington Supreme Court rests solely on its view that the

state-imposed flow levels it sustains are authorized under § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341. The very passage from the court's decision which Washington cites to support its "independent state ground" argument (Opp. 10-11), plainly shows that the Washington Supreme Court was relying on its construction of the scope of § 401 to support application of the state's water quality standards.

Further, as the Washington Supreme Court pointed out:

> [F]ederal involvement in the development of state water quality standards is extensive. Those standards are required under the Clean Water Act, 33 U.S.C. § 1313. The Act requires states to devise the standards in accordance with federal regulations and to submit them to the EPA for approval. 33 U.S.C. § 1313. After the EPA approves the state's submitted standards, they become the water quality standards for the state. 33 U.S.C. § 1313(c)(3). Washington's water quality standards, in particular, have been duly adopted by the state and approved by the EPA. 50 Fed. Reg. 29,761 (1983) (noting EPA's approval of Washington's water quality standards). If a state fails to submit standards to the EPA, or if the standards it does submit are inconsistent with the Act, the EPA promulgates its own standards for the state. 33 U.S.C. § 1313(c)(4); *see also* 56 Fed. Reg. 58,477 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131) (proposed rulemaking by EPA to bring Washington's water quality standards into compliance with section 303(c)(2)(B) of the Act). This statutory framework gives water quality standards a hybrid character: they have the character of state laws insofar as the states initially promulgate them, but they have a federal character insofar as the EPA regulates their content and must formally approve them before they actually become the state's water quality standards. Indeed, in *Arkansas v. Oklahoma*, 503 U.S. ——, 117 L. Ed. 2d 239, 257, 112 S. Ct. 1046 (1992), the Court declared that state water quality standards "are part of the federal law of water pollution control" at least insofar as they affect issuance of permits in other states.

(Pet. App. 15a). A state court's affirmance of a state agency's imposition of a condition in a § 401 certificate presents an issue of federal law. *Cf. Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992). Washington itself admits that "[t]he full scope of authority provided to states by § 401 is an issue of federal law, requiring, as it does, interpretation of the CWA" (Opp. 13).[1] It is that issue, and the issue of the relation of § 401 to the FPA's licensing process, which are of vital concern to the vast hydroelectric network in the Pacific Northwest,[2] and to the nation's hydroelectric industry.[3]

Washington ultimately confronts the real issues in this case by addressing the Washington Supreme Court's rulings that (1) the minimum flow condition "is appropriate because it is necessary to ensure compliance with an 'other appropriate requirement of state law' under § 401 (d)" (Opp. 19, 20-23); and (2) upholding the flow con-

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[1] If the judgment rested on *state* water quality standards independent of those authorized under § 401, they would be preempted under this Court's decisions in *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946), and *California v. FPC*, 495 U.S. 490 (1990). Washington's contention that it may impose flow levels on hydroelectric projects subject to licensing under the Federal Power Act ("FPA") under state law—independently of authority delegated by the CWA—would conflict directly with these decisions. *See Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 455-6 (9th Cir. 1993).

[2] See Brief of Pacific Northwest Utilities, and Brief of Northwest Hydroelectric Association, as amici curiae in support of the petitioners.

[3] See Brief of Amici Curiae American Forest and Paper Association, American Public Power Association, Edison Electric Institute, and National Hydropower Association in Support of Petition for a Writ of Certiorari.

dition is consistent with the FPA's licensing scheme (Opp. 24-27). Both of these rulings merit this Court's review. Whether a state-imposed minimum flow requirement is an "other appropriate requirement of State law" under § 401(d) is of critical importance to the relicensing of hundreds of hydroelectric projects now underway at the Federal Energy Regulatory Commission ("FERC") under the FPA, as well as to the future development of hydroelectric facilities like Tacoma's proposed Elkhorn Project. As this Court has said in an analogous context: "[t]o require the industry to proceed without knowing whether the [state regulation] is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens [of the affected state]." *Pacific Gas & Elec. Co. v. State Energy Resources Cons. and Dev. Comm'n*, 461 U.S. 190, 201-202 (1983). That observation succinctly explains the need for the Court's review in this case.

The question to be asked concerning the "other appropriate requirement of State law" clause in § 401(d) is, putting it concisely: "appropriate" to what? Tacoma and the supporting amici demonstrate that an "other appropriate requirement of State law" on which § 401 certificates may be conditioned under § 401(d) must be appropriate to the regulation of activities "which may result in any discharge into the navigable waters" within the meaning of § 401(a). Diversion of water for hydroelectric generation is not a "discharge," nor is maintaining a minimum level of streamflow for fishery habitat. Therefore, state laws regulating such diversions and flows are not "appropriate" within the meaning of § 401.

Washington's concept of an "appropriate" requirement of state law disregards the relationship between § 401(a) and § 401(d). Its view, adopted by the Washington Supreme Court, that any state-imposed requirement related to the *use of water* is appropriate, permits unlimited intrusion by the states into the FPA's licensing process.

This holding is wrong because it is not properly restricted to discharges under § 401(a), and to water quality criteria under § 303(c)(2)(A) of the CWA,[4] which are incorporated into § 401(d) and regulate such discharges.

Under Part I of the FPA, the FERC must comprehensively evaluate proposals for original and renewed hydroelectric licenses from the standpoint of national and regional as well as local considerations, taking into account impacts on the entire waterway, and giving consideration to a wide range of environmental, ecological, economic and electric power needs. State legislatures focus on the preservation of water resources for the benefit of the State alone, and state departments of ecology, fisheries, and wildlife typically represent an even narrower range of interests. There is no hint in the text or history of CWA § 401 that, in authorizing States to condition water quality certificates so as to maintain federally approved water quality standards, Congress intended to confer authority on the States to prescribe fish and wildlife conditions not based on the regulation of discharges that may pollute or degrade navigable waters. "There would be no point in Congress requiring the federal agency to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Assocs. v. Maughan*, 985 F.2d at 456.

The urgency of a decision by this Court as to the scope of state authority under § 401(d) is highlighted by a recent decision of the Supreme Court of Connecticut holding that, under that State's version of the Uniform Administrative Procedure Act, no judicial review is available of a decision by environmental officials denying a § 401 certificate on the grounds that a project would in-

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[4] State water quality standards under § 303(c)(2)(A), 33 U.S.C. 1313(c)(2)(A) (1988), consist of the *designated uses* of the navigable waters involved and the water quality *criteria* necessary to achieve those uses.

terfere with recreational use, fish and wildlife and the aesthetic quality of the river.[5] It is also well established that neither FERC[6] nor the federal courts[7] may review state decisions denying or conditioning § 401 certificates. Therefore, guidance from this Court is urgently needed by state agencies administering the § 401 certificate program, as well as by the industry, in order to achieve consistency in the administration of the CWA and the FPA.

Finally, Washington's Brief in Opposition is permeated with overstated characterizations of the impact the Elkhorn Project will have on the fish population in the Project's bypass reach (Opp. 7, 19). For example, Washington asserts that without the state-imposed minimum flows, "one section of the Dosewallips River will be lost as habitat for salmon and Steelhead" (Opp. 7)—a finding never made by any tribunal, and a contention wholly inconsistent with the minimum flow plan recommended by Tacoma.[8] The question presented by Tacoma's petition, however, is not what minimum flow level is appropriate, but whether that level should be determined by local ad-

[5] *Summit Hydropower Partnership v. Commissioner of Envtl. Protection*, Nos. 14618 and 14619 (Conn. Aug. 3, 1993) (to be reported at 226 Conn. 792) (motion for reconsideration and reargument en banc filed Aug. 13, 1993). *Cf. Triska v. Department of Health and Envtl. Control*, 355 S.E.2d 531 (1987).

[6] *Town of Summerville*, 60 FERC ¶ 61,291 at 61,990 (1992), reh'g denied, 63 FERC ¶ 61,037 (1993); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990).

[7] *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988).

[8] Similarly, no tribunal adopted the *post hoc* affidavit (Opp. 8 n.10), that attempted to rewrite the admission in the Department of Ecology's § 401 certificate that the instream flow condition was "in excess of those required to maintain water quality in the bypass region" (Pet. App. 83a).

ministrative officials focused solely on current state policy, or by the FERC under its charge comprehensively to balance all interests.

CONCLUSION

For the reasons stated in the petition for a writ of certiorari, the briefs of the supporting amici, and this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT R. MALANCA
KENNETH G. KIEFFER
GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM
2200 First Interstate Plaza
1201 Pacific Avenue
Tacoma, WA 98402
(206) 572-5050

WILLIAM J. BARKER
MARK L. BUBENIK
3628 South 35th Street
P.O. Box 11007
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VAN NESS, FELDMAN & CURTIS
A Professional Corporation
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